No. 876

In the Supreme Court of the United States

OCTOBER TERM, 1967

EDDIE M. HARRISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

291-004—68——1

CITATIONS

Cases:

Cases—Continued

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OPINION BELOW

The opinion of the court of appeals (A. 69–86) is not yet reported. The opinions of the court of appeals on an earlier appeal are reported at 359 F. 2d 214, 223 (A. 11–25, 26–46).

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1967. A petition for rehearing *en banc* was denied on August 1, 1967. The petition for a writ of certiorari was filed on August 25, 1967, and was granted on December 4, 1967 (A91; 389 U.S. 969). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's testimony at a prior trial, allegedly given to rebut inculpatory statements introduced at that trial and later held to have been erroneously admitted, was properly read into evidence at the retrial which followed reversal of his conviction.

2. Whether, in the circumstances of this case, petitioner was denied the right to a speedy trial because of allegedly protracted proceedings in the court of appeals.

STATEMENT

The procedural history and factual background of this case are not in dispute and are set forth in some detail in the opinion of the court of appeals on a prior appeal (A. 11–25) and in the opinion below on the instant appeal (A. 69–86).

1. In October 1960, petitioner and two co-defendants (White and Sampson) were convicted of felony-murder (22 D.C. Code 2401) in the United States District Court for the District of Columbia and, in April 1961, each was sentenced to death, the then-mandatory punishment for their offense (22 D.C. Code 2404 (1961 ed.)). Pending appeal it was learned that the retained "attorney" who had represented petitioner's co-defendants at trial and who had also been appointed to represent petitioner during the post-verdict stages of the case (following the death of his retained counsel), was an imposter and in fact a layman unlawfully practicing law in the District of Columbia. Upon being apprised of these facts, the court of appeals, in July 1961, remanded the case to the district court in

order that it might entertain motions for a new trial. After new counsel filed such motions, they were disaffirmed by petitioner and his co-defendants, presumably in the belief that they might rely on a plea of double jeopardy to prevent retrial. On July 12, 1962, the court of appeals, *sua sponte,* reinstated the appeals, vacated the convictions and ordered a new trial. The district court assigned the case for trial on October 17, 1962, but trial was delayed until April 1963 because of various motions filed by the defense (see A. 15–16).

2. Following this second trial before a jury, petitioner and his co-defendants were again found guilty of felony-murder and were sentenced, upon recommendation of the jury, to life imprisonment.[1]

The government's evidence at the second trial, apart from the confessions of petitioner and his co-defendants showed, in brief, the following. Shortly after 9:00 a.m. on March 8, 1960, the body of George "Cider" Brown was found just inside the closed front door of his residence. He had been killed by a shotgun blast which had traveled along an approximately horizontal course from outside the front door, through the window glass and shade, and had hit Brown in the face. Brown, who was six feet tall, lay wedged against the front door, which opened inwardly. There was a large amount of money in his

[1] The District of Columbia statute governing the punishment for felony-murder had been amended in the interim to provide for life imprisonment upon a jury recommendation (see 22 D.C. Code 2404 (Supp. IV, 1965)).

pockets (Tr. II, 124–125, 131–132, 229, 231, 584; see A. 13–14, 78).[2]

On the previous night, petitioner and his co-defendants had borrowed a black Buick from a friend (Tr. II, 224–227). One Young, who was with Brown at a restaurant about an hour before his death, testified that he noticed Sampson looking at them in the restaurant. When they left to walk to Brown's car, Sampson followed them out the door. He walked to a parked, black Buick in which two other men were seated (Tr. II, 627–631, 646; see A. 16, 78). A neighbor of Brown testified that she heard a loud noise in the street between 9:00 and 9:30 a.m. on March 8, 1960. She went outside and saw two men. One ran out of Brown's door and put what appeared to be a sawed-off shotgun under his coat; the other was standing outside the door and commenced to run when the blast occurred (Tr. II, 142–146, 169–176). One Valentine testified that he had spoken briefly to petitioner about the death of Brown some time in March 1960, and that petitioner had said that he had killed Brown with a shotgun after Brown had gone "inside of his coat for something, like he might have been going for a gun" (Tr. II, 204–210). In addition, a variety of circumstantial evidence was relied upon by the government (see A. 79–80).

The government also introduced evidence of three confessions of petitioner (two written and one oral)

[2] "Tr. II" refers to the transcript of the second trial, lodged with the clerk of this Court. "Tr. III" will refer to the transcript of petitioner's third trial.

made on March 21, 1960, while he was in police custody, as well as written, post-arrest confessions of Sampson and White. These statements,[3] which were in substantial agreement, related that the three men had been riding around in a borrowed car looking for someone to rob. They followed Brown home from the restaurant where Sampson had observed him. Petitioner and White left the car and went up to the door of Brown's residence. Petitioner carried a shotgun under his coat. After summoning Brown to the door, petitioner (after exchanging a few words) raised the gun. Brown slammed the door, which struck the gun, causing it to fire. Petitioner and White then fled and were picked up shortly thereafter by Sampson in the car (see Tr. II, 490–494—oral statement of petitioner; *id.* at 507–514—written version of same statement; *id.* at 898—written statement of petitioner to jail classification officer; see also *id.* at 817–825—written confession of White; *id.* at 425–431, 460–470—written confessions of Sampson; see also A. 17–24). The introduction of the written statements made by all three defendants was objected to on the ground that they had been obtained during a period of unreasonable detention in violation of *Mallory* v. *United States*, 354 U.S. 449;[4] the oral admissions, made by petitioner,

[3] The jury was instructed that each confession should be considered as evidence only against the party who made it.

[4] Subsequent statements of all three defendants made to jail classification officers were also introduced by the government, and were objected to on the ground that they were inadmissible under *Killough* v. *United States*, 336 F. 2d 929 (C.A. D.C.).

were also challenged as violative of the rule of *Harling* v. *United States,* 295 F. 2d 161 (C.A.D.C.) (*en banc*).[5]

After the statements had been introduced, petitioner took the stand and testified to his own version of the events leading to the death of Brown. He admitted holding the shotgun which killed Brown, but claimed that the firing was accidental and was caused by Brown's slamming the door against the gun as petitioner lifted it for Brown to examine. Petitioner stated that he and the co-defendants had come to Brown's house to pawn the shotgun without any intent to rob him[6] and that they fled when the shotgun went off (Tr. II, 1308, 1330–1332, 1334–1339). White gave basically similar testimony.

On December 7, 1965, the court of appeals reversed all of the convictions, holding that the written statements of petitioner and his co-defendants had been obtained in violation of the *Mallory* rule and the rationale of *Killough* v. *United States,* 336 F. 2d 929

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[5] *Harling* had held that admissions or confessions obtained by police from a juvenile by interrogation while he was subject to the jurisdiction of the Juvenile Court were inadmissible in a later criminal case. The oral statement at issue here was made by petitioner shortly after he had turned eighteen (and was thus no longer a juvenile under District of Columbia law) but one week before the Juvenile Court waived jurisdiction over him. Petitioner was in the District jail on other charges when he made the admissions. He was still seventeen at the time the instant offense was committed, however, and had not been charged with that crime when he made the statement (see A. 19).

[6] Petitioner testified that he knew Brown and had pawned the shotgun and other items to him before (Tr. II, 1339).

(C.A.D.C.), and thus had been improperly admitted over objection at trial (A. 11–25). On the same date the court of appeals, sitting *en banc* and dividing six-to-four, held that petitioner's oral admissions had been improperly admitted under *Harling* v. *United States,* 295 F. 2d 161 (C.A.D.C.) (A. 26–38).[7]

3. On May 4, 1966, following the third trial, petitioner and White were again convicted of felony-murder and sentenced to life imprisonment on recommendation of the jury.[8] Many of the witnesses who testified at the former trial were either dead or unavailable, and much of the government's evidence therefore consisted of the reading the second-trial testimony of these witnesses to the jury. The government also read into evidence portions of the testimony given by petitioner and White at the second trial.[9] This testimony, while essentially exculpatory in nature, placed petitioner and White at the scene of the crime and indicated that petitioner had been holding the shotgun when it fired, allegedly in an accidental manner, and that the two had fled immediately thereafter (see *supra,* p. 5).[10]

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[7] A rehearing *en banc* limited to the effect of *Harling* (see note 5, *supra,* for a discussion of that case) on the admissibility of petitioner's oral statement had been ordered, *sua sponte,* on June 1, 1965 (see A. 12). Both the panel and *en banc* opinions were released together on December 7, 1965.

[8] Sampson was acquitted by the court at the close of the government's case (Tr. III, 136).

[9] The portions of petitioner's testimony read to the jury (Tr. III, 99–129) appear at A. 48–64.

[10] There was ample circumstantial evidence to rebut petitioner's second-trial testimony that he and the co-defendants had not gone to Brown's house for the purpose of robbery (see A. 78–81).

Petitioner and White introduced no evidence in their defense. They objected to the reading of their second-trial testimony at this third trial on the ground that it was induced by the introduction of their inadmissible confessions at the second trial, contending that the admission of this testimony violated their Fifth Amendment right to remain silent (Tr. III, 130–131). They also asserted that their Sixth Amendment right to a speedy trial had been denied, principally as a result of the protracted review in the court of appeals following their second trial. The court of appeals rejected these arguments and affirmed petitioner's conviction (A. 69–86).[11] A rehearing *en banc* was denied, Judges Bazelon and Wright dissenting on the Fifth Amendment issue (A. 88–90).

SUMMARY OF ARGUMENT

A criminal defendant has a right not to testify at all, but if he chooses to testify he cannot generally give testimony for which he is not responsible. Indeed, only in rare instances is a witness's testimony unavailable for use in a subsequent criminal proceeding. Petitioner's contention that his second-trial testimony was improperly used by the government in his third trial does not come within the scope of any recognized exception to the fundamental principle that a witness

[11] White's conviction was reversed on the ground (not pertinent here) that portions of his testimony read to the jury included statements he made at his first trial when he had not been represented by a bona-fide attorney. On December 4, 1967, White was again convicted by a jury of felony-murder and sentenced to life imprisonment.

must be held accountable for his testimony. His testimony was not "compelled" within the meaning of the Fifth Amendment since he could have adequately preserved his constitutional challenge to the propriety of introducing his statements which were later held on appeal to have been illegally obtained. Any compulsion which petitioner might have felt to take the stand stemmed from the strength of the government's case, not from any requirement making his testifying the only way to raise or preserve a legal issue. His decision to testify involved purposeful trial strategy which he should not be allowed to renounce because his objections to the introduction of his statements were subsequently vindicated on appeal.

Nor was petitioner's second-trial testimony sufficiently the product of the introduction of his statements so as to be excludable at his third trial under the "fruit of the poisonous tree" doctrine. That testimony, like the testimony of any live witness, as distinguished from inanimate evidence, was given as a result of his decision to take the stand in an effort to undermine the government's strong case against him. Petitioner has made no factual showing causally connecting his testimony with the introduction of the illegally obtained statements. Indeed, the record shows that petitioner's counsel initially decided not to call petitioner as a witness, but changed his mind after assessing the probable effect of the government's case on the jury. Accordingly, the court of appeals correctly concluded that petitioner's testimony was not

tainted by the prior illegality in obtaining his statements.

An exclusionary rule should not in any event be applied in circumstances involving innocent prosecutorial or judicial error in introducing or admitting evidence at trial. Such a rule would serve no proper purpose of deterrence in such circumstances. This is particularly so where, as here, the errors occurred in a complex factual and legal situation and where no clear governmental overreaching in obtaining evidence was involved.

Petitioner's further contention that he was denied the right to a speedy trial, principally because of allegedly protracted proceedings in the court of appeals, is without merit. Although there is no categorial test for assaying the validity of a denial of a speedy trial claim, one essential element of such claim is a showing that some material prejudice has resulted. Petitioner has made no such showing here, and this provides a sufficient ground for rejecting this contention. Moreover, virtually all of the period of alleged delay resulted either from petitioner's or his attorney's actions or was necessary to ensure careful and considered appellate review of the unusual issues presented in a capital case. Applying the basic approach of orderly expedition and not mere speed, petitioner has no reason to complain about the amount of time devoted by the court of appeals to a painstaking analysis of his legal claims.

ARGUMENT

I

PETITIONER'S SECOND-TRIAL TESTIMONY WAS NOT "COMPELLED" WITHIN THE MEANING OF THE FIFTH AMENDMENT AND WAS THUS PROPERLY AVAILABLE FOR USE BY THE GOVERNMENT AT HIS THIRD TRIAL

A. THERE WAS NO NEED FOR PETITIONER TO TESTIFY IN ORDER TO CHALLENGE EFFECTIVELY THE INTRODUCTION BY THE GOVERNMENT OF HIS ILLEGALLY OBTAINED CONFESSIONS; HE COULD HAVE RELIED ON HIS OBJECTIONS, SUBSEQUENTLY VINDICATED ON APPEAL, TO THE ADMISSIBILITY OF HIS INCULPATORY STATEMENTS

Petitioner's contentions with regard to the government's use of his second-trial testimony at the third trial divide themselves into two more or less distinct claims. Petitioner argues (1) that since he was allegedly "compelled" to take the stand to rebut certain admissions later held on appeal to have been illegally obtained, his Fifth Amendment right of silence was violated by the introduction of that testimony against him upon retrial. He further asserts (2) that since his testimony was allegedly given in response to those illegally obtained statements, that testimony was in any event inadmissible under the "fruit of the poisonous tree" doctrine. While these contentions are to a certain extent intertwined and overlap one another, they are sufficiently separate, in our view, to warrant independent treatment. Moreover, we regard the "fruit of the poisonous tree" rationale as inappropriate here in any event; in our view, there is no

justification for applying an exclusionary rule to testimony of a defendant allegedly given in response to innocent prosecutorial or judicial error relating to the admissibility of evidence at trial as compared with evidence directly secured by law enforcement officers through illegal activity.

We start with the proposition that, save for rare instances, witnesses who give testimony in a criminal case in a federal court are not entitled to object to the use of that testimony by the government in a subsequent criminal proceeding. See, *e.g.*, *Walder* v. *United States,* 347 U.S. 62; *Edmonds* v. *United States,* 273 F. 2d 108 (C.A.D.C.) (*en banc*), certiorari denied, 362 U.S. 977; *Ayres* v. *United States,* 193 F. 2d 739 (C.A. 5). Indeed, it has long been accepted that no individual, not even a defendant in a criminal case, has any claim or right, constitutional or otherwise, to testify irresponsibly. He does have a right not to testify at all. If he exercises that right, the fact that he does not testify may not be used against him. If, however, he chooses to testify, for whatever reason, he has no right to give testimony for which he is not responsible, for our process of administration of criminal justice presupposes that testimony is seriously given and is therefore reliable. This principle derives its justification from the fact that our system of justice has traditionally been based in large part upon the production of evidence in which the testimony of witnesses necessarily play a significant role.

A criminal defendant's decision to take the stand involves a variety of risks, only one of which is that his testimony might be used against him in a subsequent criminal proceeding. One who testifies can be subjected to cross-examination, during the course of which he might make some damaging admissions. One who takes the stand can be impeached through the introduction of prior inconsistent statements. One who testifies can be shown to have perjured himself, or to have given testimony which conflicts with testimony given in a later proceeding. The availability of the witness's testimony in such circumstances derives directly from the premise that persons can be held responsible for what they say when they take the stand. And reliance on a witness's responsibility for his testimony, as well as the need to be able to test his veracity by a variety of means, is essential to the proper functioning of our judicial system.

In light of these considerations, exceptions to the basic principle that a defendant's testimony may be used against him are few. They have been confined to situations where the defendant's testimony has been impelled by the knowledge that he will suffer a significant detriment in the evidence of a "choice" of silence. Thus, in *Garrity* v. *New Jersey*, 385 U.S. 493, a majority of this Court held that testimony of police officers at an investigatory hearing could not be introduced against them at their subsequent trial, where the officers were subject to loss of their jobs, under a State statute, for failure to

testify at the hearing.[12] And in *Boyd* v. *United States*, 116 U.S. 616, a statute requiring production of a document on penalty of forfeiture of certain goods at issue in an action was struck down on similar grounds. But cf. *McCarthy* v. *Arndstein*, 266 U.S. 34, 41–42.

It is apparent, however, that the instant case is unlike either *Boyd* or *Garrity* and does not come within the scope of any recognized exception to the fundamental principle that a defendant must be held accountable for his testimony. Here there was no significant detriment which petitioner would suffer through a failure to become a witness at his second trial. Petitioner, by relying on his objections to the introduction of his inculpatory statements, could have adequately preserved his constitutional challenge to the propriety of that evidence and could thus have insured a retrial by prevailing, if his objections were well founded, on appeal. Any compulsion which petitioner might have felt to testify in his own defense was thus in no way dictated by any requirement making his testifying the only way to raise a legal issue.[13]

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[12] For cases involving the somewhat different problem of the use that can be made by the prosecution of a party's prior invocation of his privilege not to testify, compare *Spevack* v. *Klein*, 385 U.S. 511, *Griffin* v. *California*, 380 U.S. 609, *Slochower* v. *Board of Education*, 350 U.S. 551, and *Stewart* v. *United States*, 366 U.S. 1, with *Walder* v. *United States*, 347 U.S. 62, and *Raffel* v. *United States*, 271 U.S. 494.

[13] Moreover, in situations such as that involved in *Simmons and Garrett* v. *United States*, No. 55, this Term, argued January 15, 1968 (see 371 F. 2d 296, 298, 299 (C.A. 7) for the decision below), the lower federal courts have unanimously regarded such a choice as a permissible one to impose upon a criminal defendant, holding that his testimony given at a hearing on a pre-trial motion to suppress evidence, allegedly necessary to

If there was any actual compulsion, it derived solely from the impact which petitioner believed the government's case—if unchallenged by his own testimony—would have on the jury. Even assuming something which is essentially beyond proof—that petitioner was placed in the position of having to choose between relying on his objections and taking the witness stand to try to reduce the "certainty" (see Pet. Br. 14) of an adverse verdict[14]—that choice did not in any proper sense "compel" him to testify within the meanin of the Fifth Amendment.

Petitioner was in the same position as any defendant in a criminal trial who is confronted by a strong prosecution case.[15] As an accused in a criminal case petitioner had, as the court of appeals noted, "an absolute privilege to stay silent and, as well, the professional advice of competent counsel as to whether the privilege is to be renounced" (A. 77). He "made a conscious tactical decision to seek acquittal by tak-

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establish his standing to assert a claim of violation of Fourth Amendment rights by the government in securing certain evidence, may be introduced against him at the trial, although he elects not to take the stand before the jury. *E.g.*, *Heller v. United States*, 57 F. 2d 627 (C.A. 7), certiorari denied, 286 U.S. 567; *United States* v. *Taylor*, 326 F. 2d 877 (C.A. 4), certiorari denied, 377 U.S. 931.

[14] The jury, depending upon its assessment of petitioner's demeanor and general credibility, could well have convicted petitioner precisely *because of* his own testimony, but that is a risk that petitioner, like any other criminal defendant, necessarily took in deciding to take the stand.

[15] Many criminal defendants may view themselves as having "no real choice" (Pet. Br. 9) but to take the stand when confronted with a strong prosecution case. Yet, it could hardly be maintained that such persons had been "compelled" to testify in violation of the Fifth Amendment in all such circumstances.

in the stand after [his] in-custody statements had been let in * * *'" (*ibid.*).[16] His decision whether to testify or not was thus a matter of purposeful trial strategy which he ought not to be allowed to renounce simply because his legal claim—the raising of which in no way depended upon his taking the stand—was vindicated on appeal.[17] As the court of appeals pointed

[16] An apt analogy was suggested by the court below when it pointed out that "had [petitioner] voluntarily spoken extra-judicially" his statements would have been admissible against him "even if the remarks had attempted exoneration in the face of strong or even overwhelming indicia of guilt" (A. 76). It seemed incongruous to the court that such statements could nonetheless be thought inadmissible if "made at a judicial trial, where [petitioner was] surrounded by the full panoply of legal protections," for, in the court's view, his "second-trial account of the fatal episode lost none of [its] qualit[y] of admissibility merely became [it was] rendered in open court or [was] induced by an evaluation of the capabilities of the Government's proof to convict" (*ibid.*).

[17] In this respect the situation here differs significantly from that in *Griffin* v. *California*, 380 U.S. 609, where the Court concluded that adverse comment on a defendant's failure to testify violated his privilege against self-incrimination. Here there was no adverse comment on petitioner's failure to take the stand, for he in fact testified. That testimony was in no proper sense "compelled", since he could have preserved his objections to admissibility by remaining silent. Conversely, there is no way to avoid the prejudicial effect of an adverse comment on failing to testify except by taking the stand. That was the precise vice found by this Court in *Griffin*. Moreover, petitioner's determination not to take the stand in the instant trial, unlike in *Griffin*, did not result in a "cut[ting] down on the privilege by making its assertion costly" (380 U.S. at 614); nor was petitioner subjected to "a penalty imposed by courts for exercising a constitutional privilege" (*ibid.*). Petitioner was in no sense "penalized" by the introduction of his second-trial testimony, which we must assume was responsibly given. Nor was his assertion of the privilege at the instant trial made "costly"

out in rejecting petitioner's argument in this regard (A. 75):

> Our federal system bestows upon an accused the choice of testifying or not, and permits what he says from the witness stand to be used against him if not elicited coercively. * * * Here, unlike situations where duress of some sort has been found, the Government exerted no pressure, offered no inducement and imposed no improper conditions upon [petitioner's] right to muteness. There was uninhibited access to counsel, and so far as we can perceive, complete awareness of legal rights. We have been referred to no case, and our own intensive research has located none, holding that the strength of the Government's case is itself a vitiating form of testimonial compulsion.

In short, petitioner was in no proper sense "compelled" to testify at his second trial. Having decided to testify, he can be held to the ordinary consequences which flow from taking the stand. He is presumed to have testified responsibly, and his testimony, like the statements of any other unavailable witness, can be introduced by the government in a subsequent criminal proceeding.

B. PETITIONER'S DECISION TO TESTIFY WAS NOT THE PRODUCT OF THE INTRODUCTION BY THE GOVERNMENT OF HIS INADMISSIBLE STATEMENTS; USE OF HIS TESTIMONY BY THE GOVERNMENT UPON RETRIAL WAS THEREFORE NOT PRECLUDED BY THE "FRUIT OF THE POISONOUS TREE" DOCTRINE

Petitioner contends that his second-trial testimony was sufficiently the product of government illegality—

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through the introduction of his earlier testimony, unless we assume that he testified inaccurately or untruthfully on that occasion.

i.e., the introduction of the statements later held on appeal to have been illegally obtained and thus inadmissible—so as to be excludable as "fruit of the poisonous tree." *E.g., Nardone* v. *United States,* 308 U.S. 338, 341. Assuming, *arguendo,* the propriety of applying the "fruit of the poisonous tree" rationale to the facts of this case,[18] the contention must be judged within the framework of the test laid down in *Wong Sun* v. *United States,* 371 U.S. 471,[19] where this Court stated (*id.* at 487–488):

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. Maguire, *Evidence of Guilt,* 221 (1959)."

Thus, the pertinent standard is not a simple "but for" test; rather, the question in each case is whether the evidence sought to be introduced has been derived from a sufficiently independent source so that it can

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[18] As indicated previously (*supra,* pp. 11–12), we challenge the applicability of that doctrine in the instant circumstances, for the reasons discussed at a later point (see *infra,* pp. 24–27).

[19] Parenthetically, if Wong Sun's post-arraignment voluntary confession was not a "fruit" of his unlawful arrest two days before, but the result of his independent choice, as this Court held (*Wong Sun, supra,* 371 U.S. at 491), petitioner's second-trial testimony, given at a place and time far removed from any actual, operative illegality, was clearly not come by through the exploitation of such illegality, but was the result of his own unfettered will.

properly be concluded that the effect of the illegality had "become so attenuated as to dissipate the taint" (*Wong Sun, supra,* 371 U.S. at 491, quoting from *Nardone, supra,* 308 U.S. at 341; see also *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392). Application of this standard requires in each case a careful examination of the surrounding circumstances.

Petitioner's precise claim is that the introduction of extra-judicial statements later held to have been illegally obtained so tainted the testimony he gave, allegedly to rebut these statements, that that testimony was a "fruit" of the prior illegality and accordingly inadmissible upon retrial. In this respect, the contention is not substantially different from an objection to the live testimony of any witness on the ground that his testimony was tainted by some prior illegality, although here the live testimony was given at one trial and read into evidence at a later trial. Thus, the context for evaluating petitioner's claim that the evidence challenged was inadmissable "fruit" is that of actual testimony given by a live witness during a trial and under oath. We recognize that this Court has not had occasion to consider whether there are circumstances in which taint might be found in the context of a challenge to the admissibility of live witness testimony. But see *Goldstein* v. *United States,* 316 U.S. 114; cf. also *United States* v. *Bayer,* 331 U.S. 532, 539–541. But the federal courts which have reached this question have uniformly recognized the increased burden which the party seeking to exclude such testimony must bear, in light of the fact that human beings, unlike inanimate evidence, are capable

of independent choice and thought. As the court stated in *Smith and Bowden* v. *United States*, 324 F. 2d 879, 881 (C.A.D.C.), certiorari denied, 377 U.S. 954:

> The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual whose attributes of will, perception, memory and volition interact to determine what testimony he will give.[20]

Focus upon "attributes of will, perception, memory and volition" seems particularly appropriate in cases like the present one where the witness whose testimony is sought to be excluded is a *defendant* whose decision to testify will ordinarily be the product, at least in great part, of his own, or his counsel's, trial strategy. In cases such as this, where it is claimed that a defendant testified *because of* the introduction in the government's case of certain illegally obtained evidence, it will generally prove extremely difficult, if not impossible, to isolate the various reasons and motives upon which defense counsel's decision to have the defendant take the stand were based.

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[20] Compare also, applying the above observations but reaching divergent conclusions on different facts, *Edwards* v. *United States*, 330 F. 2d 849 (C.A.D.C.), and *Brown* v. *United States*, 375 F. 2d 310 (C.A.D.C.), certiorari denied, 388 U.S. 915, with *Smith and Anderson* v. *United States*, 344 F. 2d 545 (C.A.D.C., and *United States* v. *Tane*, 329 F 2d 848 (C.A. 2.). In contrast, the courts in the California cases cited by petitioner (Pet. Br. 16–17), *e.g.*, *People v. Polk*, 63 Cal. 2d 443, 406 P. 2d 641, certiorari denied, 384 U.S. 1010, seem not to have considered this point in reaching their decisions.

Petitioner, beyond bare assertions that taking the stand was his "only hope of avoiding * * * conviction" (Pet. Br. 12) and that his testimony was "wrung from him" (Pet. Br. 16), has not attempted to make a factual showing which causally connects his testimony with the introduction of the illegally obtained admissions. That inquiry is, however, aided in this case by the existence of an unusual record casting considerable light on defense counsel's reasons for calling petitioner as a witness in his own behalf. Here the record shows that petitioner's counsel, in his opening statement, informed the jury that petitioner would not testify. Counsel stated that his defense would be "to so destroy by cross-examination or the presentation of [contradictory] witnesses * * * the testimony given by Government witnesses, that you will decide that it is so ineffective and perhaps untrue or unworthy of credibility that you will throw it out" (Tr. II, 77). Following the close of the government's case, petitioner's counsel advised the judge that "the defendant may, through counsel, * * * change his mind about [testifying]" (Tr. II, 957). The trial court permitted petitioner, with his co-defendants' consent, to be called last to present his case rather than first. Petitioner thereafter did in fact take the stand (Tr. II, 1291–1370) and gave, *inter alia*, the testimony now in question.

Defense counsel later indicated that the reason which led him to alter his decision not to put petitioner on the stand was his own feeling that his

original trial strategy of destroying the credibility of the government's witnesses had not succeeded. In a comment to the jury at the beginning of his closing argument, he stated (Tr. II, 1566–1567):

> At the outset in my opening I told you that my defense on behalf of Harrison would be that I would bring about the destruction of the Government's case; that is, through its witnesses by proving that they would not testify truthfully. And, further, that I would not put the defendant Harrison on the stand.
>
> I think you will agree that in both instances I think I have not done either. Mr. Harrison did take the stand and I did not bring about the kind of destruction which I indicated to you I would, of the testimony of the witnesses of the Government * * *.

It seems apparent that defense counsel's decision to have petitioner take the stand was not motivated in any direct causal sense by the government's introduction of his statements. Counsel must have been aware from his trial preparations of the existence of those confessions and their intended use by the government. But he indicated at the outset of the trial that he had made a deliberate decision not to have petitioner testify *notwithstanding* the contemplated use of those confessions. Instead, he initially determined that he would challenge the credibility of all the government witnesses through cross-examination. Much of the government's testimony would naturally center around the circumstances under which the confessions were made, and counsel doubtless thought he could cast sufficient doubt on the credibility of the govern-

ment's witnesses in this regard to give his client a reasonable chance of acquittal. At the close of the government's case, however, defense counsel obviously realized, and indeed candidly admitted later, that he had not succeeded in undermining the credibility of the government's witnesses to the extent he anticipated at the outset of the trial. He then reevaluated his strategy and determined to call petitioner as a witness, in part at least to bolster a contention that his statements had been obtained involuntarily. This conclusion is strongly suggested by the fact that, during petitioner's direct examination, counsel took care to question him not only as to his version of the events leading to the death of "Cider" Brown (thus challenging the content of the confessions), but also as to the circumstances under which the statements were made (see Pet. Br. 4–5, 11–12). Petitioner testified that he had been beaten and threatened prior to signing the inculpatory statements (Tr. II, 1324–1329), and defense counsel utilized that testimony to make a lengthy closing argument to the jury on the issue of voluntariness (Tr. II, 1574–1582).

On this record, the court of appeals' conclusion that petitioner's testimony was not tainted by the introduction against him of his unlawfully obtained statements was clearly correct. As the court noted (A. 77–78):

> [Petitioner] admittedly made a conscious tactical decision to seek acquittal by taking the stand after [his] in-custody statements had been let in, and the record reflects an appreciable interval for interaction of mental processes preceding this decision and the testimonial acts

> themselves. It would be rash to assume that [petitioner] facing the death penalty upon conviction would be unduly influenced to testify favorably to the Government by either the introduction of the prior confessions or their procurement three years previously. In the circumstances here, we deem the relationship between the erroneous admission of [petitioner's] statements and [his] testimony at the second trial to be "so attenuated as to dissipate the taint." [*Nardone* v. *United States,* 308 U.S. 338, 341].

Moreover, we cannot accept petitioner's implicit assumption that some kind of exclusionary rule should apply to a defendant's testimony given in response to evidence admitted through innocent prosecutorial or judicial error. Considering its historical evolution and its traditional function as a prophylactic device, an exclusionary rule would serve no proper role in such circumstances. The ordinary justification for application of an exclusionary rule (of which the "fruit of the poisonous tree" doctrine is but an offshoot) is that it serves to deter governmental illegality in procuring evidence "by removing the incentive to disregard" an individual's constitutional rights.[21] That purpose would not be significantly aided by the exclusion of evidence allegedly given in response to innocent prosecutorial or judicial mistake. There is no basis for believing that prosecutors would attempt to

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[21] *Elkins* v. *United States*, 364 U.S. 206, 217; see *Mapp* v. *Ohio*, 367 U.S. 643, 656–657; see also *Miranda* v. *Arizona*, 384 U.S. 436; *Mallory* v. *United States*, 354 U.S. 449; *Massachusetts* v. *Painten*, No. 37, this Term, decided January 15, 1968 (Mr. Justice White, dissenting).

elicit a defendant's testimony by intentionally seeking admission of damaging, illegally obtained evidence or that district judges would knowingly permit the introduction of such evidence. Here, as the court of appeals noted (A. 76), there is "not even a whisper that the Government, in utilizing the statements at the second trial, was motivated by a purpose to elicit a testimonial response from appellants." Nor can one regard the trial court's error, particularly with respect to admitting petitioner's initial, oral admissions, as egregious. Indeed, before the court of appeals *en banc* found that statement inadmissible, in a 6–4 decision (see A. 26–46), a panel of that court had held that that evidence had been properly admitted at trial (A. 22–23). And the ground on which the *en banc* determination of inadmissibility rested involved a rather technical and quite unanticipated construction of the court of appeals' decision in *Harling* v. *United States*, 293 F. 2d 161 (see *supra*, p. 7).[22] In such a complex factual and legal situation it can only be concluded that the errors committed in introducing and admitting this evidence were wholly innocent and quite explicable. In such a context, a concept of deterrence obviously has no place.

Although it was ultimately determined that petitioner's statements had been obtained illegally, the effects of that illegality were erased by the reversal of petitioner's conviction on appeal and the grant of a new

[22] It should be noted that the panel which initially passed on the relevance of *Harling* stated that that case "requires no such absurd result, for neither its rationale nor the circumstances there considered can have application here" (A. 23; see also the dissent to the *en banc* decision, A. 38–46).

trial from which the illegally obtained statements were excluded. Thus, the second-trial "misconduct" to which petitioner's testimony allegedly related involved merely the innocent errors of the prosecutor in introducing those statements and of the trial judge in admitting them [23]—not the typical sort of police illegality which ordinarily triggers application of an exclusionary rule. This is simply not a case involving statements made in direct response to clear governmental overreaching, or evidence seized as a result of a demonstrable intrusion on constitutionally protected rights. Rather, the instant case is analogous to one where the prosecutor innocently uses a witness who gives testimony later discovered to be perjured, to which the defendant has responded; or where, by reason of innocent error, the prior criminal record of the government's complaining witness is not discovered until after the trial, and the defendant has taken the stand to rebut that witness's testimony. Cf. *United States* v. *Gordon,* 246 F. Supp. 522 (D.D.C.); *Kretske* v. *United States,* 220 F. 2d 785 (C.A. 7), reversed *per curiam,* in consideration of the government's confession of error, 350 U.S. 807. In these instances, an exclusionary rule predicated upon a

[23] Even if it is assumed, *arguendo*, that petitioner's testimony was in some respects induced by the introduction and admission of his inculpatory statements, defense counsel's tactical decision to have petitioner take the stand—which proved unnecessary since the court of appeals later held the statements to have been illegally obtained—was predicated on the very same error of law ultimately determined to have been made by the prosecutor and trial court regarding the admissibility of this evidence. Thus, the government and the trial court are no more culpable in this regard than petitioner himself.

concept of deterrence would obviously be inappropriate and ineffective.

Nor is the present case an apt one for application of the precept that the doer of wrong shall not profit from his action. Here there was no deliberate wrongdoing. Although the government, under the approach we advocate, can utilize a defendant's testimony elicited in response to evidence erroneously admitted, that result is justified by the need of our system of justice to rely on the fact that testimony is given responsibly (see *supra*, pp. 12–13). Only when testimony can be shown to have been actually "compelled" could a witness—whether a criminal defendant or not—be said to have a right to give testimony for which he is not responsible—*i.e.*, which may not be used against him in a subsequent criminal proceeding. Here, as previously discussed, it is clear that there was no compulsion dictating petitioner's testimony since he could have relied on his objections to the admissibility of his confessions without ultimately incurring any detriment. Once the lack of compulsion for petitioner to testify becomes apparent, the following language from *Raffel v. United States*, 271 U.S. 494, 497, 499, takes on a particular and conclusive pertinence:

> [The defendant's] waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will * * *.
>
> * * * * *
>
> The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness. * * *

II

THE PERIODS OF DELAY OF WHICH PETITIONER COMPLAINS RESULTED IN NO PREJUDICE TO HIS ABILITY TO CONDUCT HIS DEFENSE AND WERE IN ANY EVENT EITHER HIS OWN RESPONSIBILITY OR AN INCIDENT OF CONSIDERED APPELLATE REVIEW OF THE UNUSUAL QUESTIONS PRESENTED IN THIS CASE; THERE WAS THEREFORE NO DENIAL OF THE RIGHT TO A SPEEDY TRIAL

Petitioner contends that he was denied the right to a speedy trial, largely through allegedly protracted proceedings in the court of appeals. His claim is in some respects a novel one,[24] since his primary focus is upon the time taken for appellate review (as a result of which he prevailed) and not upon delay in bringing him to trial. In any event, petitioner's claim, whether assessed under the Sixth Amendment or the Due Process Clause of the Fifth Amendment, is essentially without merit.

There is of course no categorical test for appraising a claim that the right to a speedy trial has been denied. As this Court stated in *Pollard* v. *United States*, 352 U.S. 354, 361, "Whether delay in completing a prosecution * * * amounts to an unconstitutional deprivation of rights depends upon the circumstances." This is so, of course, because the nature of the subject matter, with its virtually unlimited possible variants, does not lend itself to the articulation of a precise standard. See *Beavers* v. *Haubert*, 198 U.S. 77, 87; *Hedgepeth* v. *United States*, 364 F. 2d 634, 687 (C.A.D.C.).

[24] We have found no case in which a similar claim of denial of the right to a speedy trial based upon alleged appellate court delay has been made.

However, one essential element is that the person claiming denial of the right to a speedy trial show that some material prejudice has resulted. See, *e.g., United States* v. *Ewell,* 383 U.S. 116, 122; *Tynan* v. *United States,* 376 F. 2d 761 (C.A.D.C.), certiorari denied, 389 U.S. 845; *Mann* v. *United States,* 304 F. 2d 394, (C.A.D.C.), certiorari denied, 371 U.S. 896. Here petitioner asserts no prejudice resulting from the periods of delay about which he complains; nor, as the court of appeals found (A. 74; see A. 72, n. 13),[25] is any apparent from the face of the record. His failure to make any showing that his ability to conduct his defense was impaired by the allegedly unreasonable delay accordingly precludes a finding that his constitutional rights were infringed. *United States* v. *Ewell, supra;* see *King* v. *United States,* 265 F. 2d 567 (C.A. D.C.) (*en banc*), certiorari denied, 359 U.S. 998. The delays, for the most part, were either the consequence of his own or his attorney's actions, for which he is responsible, or were necessary to ensure careful and considered appellate review of the complex and unusual issues presented by this case.

1. *The post-first trial period of delay.* Following the revelation of the "Morgan masquerade" (A. 14),

[25] As the court of appeals indicated (A. 74), the "only concrete suggestion" made regarding possible prejudice allegedly resulting from the duration of appellate review was "that the absence of some of the Government's witnesses and the resulting need to read their prior testimony to the jury precluded additional cross-examination." But, as the court below pointed out (*ibid.*), petitioner "had, and utilized, the opportunity to question those witnesses fully during the second trial, and at the third trial [was] free to present to the jury the prior cross-examination but elected not to do so."

while petitioner's first-trial conviction was pending in the court of appeals, that court, on July 21, 1961, issued an order requiring the district court to award a new trial to petitioner and his co-defendants upon their filing of appropriate motions within ten days. Counsel for all of the defendants filed such motions, but at a hearing on September 14, 1961, informed the district judge that the motions had been filed without the consent of the defendants, who wished to disaffirm them, apparently because of a belief that they might rely on a claim of double jeopardy. On October 4, 1961, the district judge ordered the motions for a new trial to be withdrawn in light of this disaffirmance, and resubmitted the matter to the court of appeals (A. 4–8). That court thereafter, on July 12, 1962, *sua sponte,* reinstated the appeals, vacated the convictions and remanded the case to the district court with orders to conduct a new trial (see A. 15).

The court of appeals correctly found that petitioner was responsible for the above-described delay by failing to take advantage of the opportunity afforded him to move for a new trial (A. 15–16). Petitioner's contention (Pet. Br. 23–24) that he cannot be taxed with this delay because by moving for a new trial he would have forfeited his ability to assert a claim of double jeopardy [26] is unsound. Petitioner was not confronted

[26] The court of appeals properly rejected the double jeopardy claim following petitioner's second-trial conviction, deeming the first trial, in which the imposter-attorney participated, to be a nullity (A. 14–15).

with the "Hobson's choice" he asserts since there is no evident reason why he could not have filed the motion for a new trial and at the same time preserved his right to rely upon a defense of double jeopardy. In any event, if the alternatives claimed were real, the strategic choice not to file such a motion and to rely on the double jeopardy defense was his own, for which he can properly be held accountable.

Petitioner also contends that the period from June 1962, when the court of appeals ordered a new trial, to April 1963, when the trial commenced, involved unnecessary delay for which he was not responsible. The docket entries show, however, that following the appointment of counsel for petitioner on October 30, 1962,[27] much of the ensuing delay was caused by pretrial motions made either by counsel for petitioner or pe-

[27] The docket entries do not indicate the date of withdrawal of Mr. Halper, counsel for petitioner who had been appointed on July 31, 1961, and who had appeared at the hearing on September 14, 1961, to inform the district judge of petitioner's desire to withdraw the motion for a new trial which had been filed on his behalf (see A. 5, 7). Therefore, it is not clear from the record that petitioner, as he asserts (Pet. Br. 25), was without counsel for the entire four-month period between June and October 30, 1962, when new counsel was appointed to represent him. In any event, at least on the date when counsel was furnished, it became petitioner's obligation, if he desired a speedy retrial, to make a demand therefor. *Bayless* v. *United States*, 147 F. 2d 169, 170 (C.A. 8), cited with approval in *United States* v. *Ewell*, 383 U.S. 116, 121–122, n. 7; *United States* v. *Gladding*, 265 F. Supp. 850, 853–855 (S.D.N.Y.).

titioner himself.[28] On January 18, 1963, petitioner's attorney (Mr. David) moved for a trial continuance of two months to March 18, 1963, which was granted. During February Mr. David was relieved, pursuant to petitioner's motion, and new counsel (Mr. Woods) was appointed. That appointment was vacated on March 5, 1963 (the reason does not appear), and Mr. Thomas, petitioner's eventual second-trial counsel, was substituted. On March 29, 1963, petitioner and co-defendant White filed motions to dismiss the indictment. Argument was held and the motions were denied on April 5, 1963. The second trial began on April 22, 1963.

The court of appeals' conclusion that on this record this period of delay could fairly be attributed to petitioner was correct (see A. 15–16, 72, n. 13). Moreover, even if a portion of the period might be attributed to other causes, that is hardly a sufficient basis—in light of the fact that no prejudice has been shown—for overturning petitioner's conviction. *E.g., Reece* v. *United States,* 337 F. 2d 852 (C.A. 5); *Barnes* v. *United States,* 347 F. 2d 925 (C.A. 8).

2. *The time taken for appellate review of petitioner's second conviction.* Oral argument in the court of ap-

[28] In describing the reasons for the delay during this period, the court of appeals stated (A. 15–16): "The District Court * * * assigned the case for trial on October 17, 1962. By that date there had been hearings on motions of various court-appointed counsel for leave to withdraw; Harrison had no attorney; Attorney David, appointed October 30, 1962, thereafter sought a continuance contending that he had no transcript of the first trial; Harrison then moved that Attorney David be discharged; motions to dismiss on double jeopardy grounds had been filed and argued; in short, on one basis or other, the District Court was occupied with a series of defense motions, some purportedly of substance, some procedural, but all contributing to delay."

peals on the appeal from the second-trial convictions was had on December 18, 1963.[29] An opinion was rendered by the panel (but not published) in which all of the confessions and admissions of the appellants which had been introduced at the trial were ruled inadmissible, except for the oral admissions of petitioner. On June 1, 1965, the court of appeals, *sua sponte,* determined that the issue of the admissibility of petitioner's oral statement under *Harling* v. *United States,* 295 F. 2d 161 (C.A.D.C.), was sufficiently important to warrant reconsideration *en banc* (A. 12). Reargument *en banc* was had on June 15, 1965, and the full court's decision holding the statement inadmissible in light of *Harling* was announced on December 7, 1965, and the majority and dissenting opinions on this issue were handed down on that date along with the earlier opinion of the original panel (see A. 11–46).

Petitioner's contention that the time thus consumed (a period of approximately two years) deprived him of the right to a speedy trial disregards the exigencies of appellate review of difficult issues in a capital case. A reading of the opinions of the court released on December 7, 1965 (A. 11–46), reveals the number and complexity of the questions considered and disposed of by the court of appeals and illustrates more convincingly than any extended argument the necessity for "the essential ingredient [of] orderly expedition and not mere speed" (*Smith* v. *United*

[29] The jury verdict was rendered on May 8, 1963 (see A. 13), and the judgment of conviction was entered on June 18, 1963 (A. 9).

States, 360 U.S. 1, 10) in this far-from-ordinary case.[30] While the two years thus consumed was substantial, it was not an unreasonably long period of time for the reviewing court to take in rendering its decision, once all the circumstances are considered.

As this Court has recently had occasion to emphasize, "the * * * procedures for criminal prosecution are designed to move at a deliberate pace. A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself." *United States* v. *Ewell, supra,* 383 U.S. at 120; see also *Beavers* v. *Haubert,* 198 U.S. 77, 87. Similarly, as the court of appeals pointed out (A. 73), "The time necessarily consumed in unraveling complex issues whose ultimate resolution vindicates the rights of the accused can hardly be said to constitute purposeful or oppressive delay." Petitioner has no justifiable cause for complaint where the time that elapsed was in fact utilized to undertake a painstaking analysis of his legal claims and thus to avoid the "deleterious effect" on his rights that might have resulted from a more hasty analysis. This is particularly so where, as here, no prejudice is shown to have resulted from the challenged delay (see *supra,* pp. 28–29).[31]

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[30] As the court below noted (A. 73–74), "One has but to examine the comprehensive opinions the second appeal brought forth to appreciate the court's task and foresee the risk that unwarranted haste might have worked to [petitioner's] disadvantage."

[31] We do not construe petitioner as protesting the reasonableness of the eight and one-half month period needed for the orderly and deliberate consideration by the court of appeals (including the disposal of a petition for rehearing *en banc*) of the issues raised after his instant conviction (see Pet. Br. 26).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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